

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDY A. McPHEETERS)	
Claimant)	
VS.)	
)	Docket No. 202,132
WESLEY MEDICAL CENTER)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals the Award of Special Administrative Law Judge William F. Morrissey dated January 8, 1997. The Appeals Board heard oral argument on June 13, 1997, in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through her attorney, Dale V. Slape of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, P. Kelly Donley of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board. In addition, the parties stipulated that claimant's date of accident occurred subsequent to July 1, 1994, and, pursuant to K.S.A. 44-567(a) the Kansas Workers Compensation Fund would have

no liability in this matter. As such, the Kansas Workers Compensation Fund is dismissed without liability with the exception of being responsible for its own attorney fees.

In addition, the parties stipulated at oral argument that the dispute regarding claimant's average weekly wage deals with the additional compensation due claimant and when same should be included in the average weekly wage pursuant to K.S.A. 44-511. The parties acknowledge and stipulate that, for payment of temporary total disability compensation, claimant's average weekly wage of \$241.78 would be the appropriate wage to utilize without the inclusion of fringe benefits. Thereafter, for any award of permanent partial disability compensation the average weekly wage of \$289.33 would be utilized, which includes fringe benefits of \$47.55.

ISSUES

Nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the Award of the Special Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Special Administrative Law Judge are accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein.

The Special Administrative Law Judge awarded claimant a 7.5 percent permanent partial general body disability on a functional basis and denied claimant any additional work disability. In refusing to grant claimant a work disability, the Special Administrative Law Judge focused on claimant's lack of a good faith effort in a job search process instituted by respondent. After claimant attempted to return to work, respondent acknowledged it was unable to meet claimant's medical restrictions. A job search program was started with Diana Joseph, a rehabilitation consultant and job placement specialist for Terrill & Associates. Ms. Joseph worked with claimant in finding job leads, setting up job interviews, and scheduling training sessions, many of which claimant failed to attend. Ms. Joseph counseled claimant on obtaining her GED and provided her with a handout discussing the GED pretest and when it could be administered. Claimant never attempted to take the pretest thus precluding Ms. Joseph from evaluating claimant's strengths and weaknesses and her need for additional education before she attempted the GED. Ms. Joseph found telemarketing jobs within claimant's restrictions but claimant failed to attend scheduled interviews, advising Ms. Joseph she was not interested in a telemarketing job. Ms. Joseph scheduled claimant with job interviews with other companies including Rose America,

Dillons on South Broadway, Comfort Inn, and the Harvey Hotel but claimant also failed to attend those interviews.

On December 13, 1995, claimant failed to attend an appointment with Ms. Joseph. On December 14, 1995, Ms. Joseph terminated her services with claimant due to claimant's lack of cooperation.

The Special Administrative Law Judge found claimant to lack good faith in the job search process and denied her work disability. The Appeals Board finds justification in the record for this conclusion. Ms. Joseph found it frustrating that jobs located for claimant within her ability and restrictions were not pursued, some at a wage higher than the wage claimant was earning at the time of her injury.

The Kansas Court of Appeals considered work disability and a worker's entitlement to same when dealing with an uncooperative worker in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk the claimant was offered an accommodated position with respondent but the evidence indicated claimant refused to participate in a work-hardening rehabilitation program or even attempt the offered job. The Court of Appeals in construing K.S.A. 1988 Supp. 44-510e(a) stated it was inappropriate to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage where the proffered job was within the worker's ability and the worker refused to even attempt the job. The Court of Appeals went on to state:

"The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage."

While the work disability formula of K.S.A. 44-510e has changed since Foulk, the philosophy of Foulk remains. The Appeals Board cannot imagine that the legislature intended workers to be rewarded for sitting at home refusing work and refusing to cooperate with job placement programs. In this instance, the claimant, on numerous occasions, missed appointments and interviews, and failed to follow through with the job search program instituted by Ms. Joseph. As such, the Appeals Board finds the denial of work disability in this matter to be appropriate and claimant is limited to the stipulated functional impairment of 7.5 percent to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated January 8, 1997, should be, and is hereby, modified and an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Judy A. McPheeters, and against the respondent, Wesley Medical Center, a self-insured, for an accidental injury arising out of and in the course of claimant's employment on or about March 24, 1995, and based upon an average weekly wage of \$241.78 for 21.71 weeks of temporary total disability compensation at the rate of \$161.19 in the amount of \$3,499.43; and based upon an average weekly wage of \$289.33 for 30.62 weeks of permanent partial disability compensation at the rate of \$192.90 per week in the sum of \$5,906.60 for a total award of \$9,406.03, all of which is due and owing in one lump sum minus amounts previously paid.

In all other regards the Award of the Special Administrative Law Judge is affirmed insofar as it is not inconsistent with the findings contained herein.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
P. Kelly Donley, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director